

APPEAL NO. 020453
FILED APRIL 10, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 29, 2002. The hearing officer determined that the compensable injury sustained by the appellant (claimant) on _____, extends to and includes findings consistent with the lumbar spine MRI, which was performed on October 17, 2000; that the claimant had disability from February 21, 2001, through the date of the CCH; and that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. V on June 22, 2000, has become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). On appeal, the claimant contends that the MMI/IR determination is against the great weight of the evidence. The respondent (carrier) urges affirmance.

DECISION

Reversed and rendered.

The evidence reflects that on June 22, 2000, the claimant's treating doctor, Dr. V, initially certified that the claimant reached MMI on June 21, 2000, with a 2% IR. On July 12, 2000, the claimant was examined by Dr. H, the doctor selected by the carrier, who determined that the claimant had not yet reached MMI and estimated that MMI would be reached on October 1, 2000. There is no indication that the claimant disputed MMI/IR prior to the proceedings that have become the basis for this appeal. The hearing officer determined that the first certification of MMI/IR assigned by Dr. V became final under Rule 130.5(e) because the claimant did not dispute it within 90 days. The claimant argues that his IR has not become final because Dr. V misdiagnosed his condition and, as such, Rule 130.5(e)(2), which provides an exception to the 90-day rule, applies in this case. The carrier argues that no misdiagnosis existed at the time Dr. V initially certified MMI/IR and, therefore, since the claimant did not dispute the certification within 90 days, the 2% IR assigned by Dr. V has become final.

In support of their respective positions, the hearing officer, claimant, and carrier all refer to Rule 130.5(e), which has been repealed and is no longer controlling with regard to MMI/IR disputes. The original version of Rule 130.5(e), effective January 25, 1991, provided:

The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

The amended version of Rule 130.5(e), effective March 13, 2000, provided:

The first certification of MMI and [IR] assigned to an employee is final if the certification of MMI and/or the [IR] is not disputed within 90 days after written

notification of the MMI and IR is sent by the Commission [Texas Workers' Compensation Commission] to the parties, as evidenced by the date of the letter, unless based on compelling medical evidence the certification is invalid because of:

- (1) a significant error on the part of the certifying doctor in applying the appropriate AMA Guides [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association] and/or calculating the [IR];
- (2) a clear mis-diagnosis or a previously undiagnosed medical condition;
or
- (3) prior improper or inadequate treatment of the injury which would render the certification of MMI or [IR] invalid.

The amended Rule 130.5(e) was repealed effective January 2, 2002. In Fulton v. Associated Indem. Corp., 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied), the court determined that the original version of Rule 130.5(e), the 90-day rule, which restricted the time period for disputing an IR, implicitly limited a claimant's time period for revisiting the assessment of MMI, because when the IR became final, so did the determination of MMI. With respect to the original version of Rule 130.5(e), the court held that: (1) because Rule 130.5(e) severely restricts the statutory time period for assessing a final MMI, the Commission exceeded its authority in enacting the rule; (2) the rule is arbitrary and invalid because it impermissibly shortens the statutory time period allotted to an injured worker to achieve MMI; (3) Section 401.011(30) establishes a 104-week deadline for a worker to achieve MMI, and the Commission may not, by rule, shorten this statutory period because to do so would impose restrictions in excess of those imposed by the 1989 Act; (4) Rule 130.5(e) is invalid to the extent it prevents a reassessment of MMI because the IR or MMI was not disputed within 90 days; and (5) Rule 130.5(e) imposed on Fulton a restriction in excess of that found in the plain language of the 1989 Act and that Fulton's MMI certification, and, therefore, his IR, did not become final. Although the Fulton decision held that the original Rule 130.5(e) is invalid, in Texas Workers' Compensation Commission Appeal No. 020014-s, decided February 26, 2002, we held that the reasons for invalidating the original rule also apply to the amended Rule 130.5(e).

Accordingly, we reverse the hearing officer's decision that the first certification of MMI/IR became final under Rule 130.5(e), and we render a new decision that the first certification of MMI/IR did not become final.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION for Reliance National Insurance Company, an impaired carrier**, and the name and address of its registered agent for service of process is

**MARVIN KELLY
TEXAS PROPERTY AND CASUALTY INSURANCE
GUARANTY ASSOCIATION
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Chris Cowan
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Judge